Petition

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SUPREME COURT U.S.

No. 81- 5086

IN THE

SUPREME COURT OF THE UNITED STATES

1981 Term

STEPHEN TODD BOOKER,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

STEPHEN N. BERNSTEIN
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725 Northeast First Street
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ATTORNEY OF RECORD

QUESTIONS PRESENTED

1. Whether the petitioner was denied his Fifth Amendment rights against self-incrimination when the trial court permitted the prosecutor to cross-examine him based upon information gathered from a Court ordered psychiatric report?

2. Whether the petitioner was denied his Fifth and Fourteenth Amendment rights to due process of law when prosecuted pursuant Florida Statute §921.141 where there were insufficient constitutional standards of reliability in the fact finding process?

3. Whether the petitioner was denied his Eighth Amendment rights, protection against cruel and unusual punishment under a Florida Statute §922.10, which provides for death by electrocution as punishment?

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_____ Term, 1981

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PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE UNITED STATES

Petitioner, Stephen Todd Booker, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 397 So. 2d 910 (Fla. 1981) and is attached hereto as an Appendix A.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on March 19, 1981. A timely petition for rehearing was denied on June 3, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person . . . shall be compelled in criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law;"

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

2. This case also involves the following provisions of the statutes of Florida:

> "§ 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence
>
> (1) Separate proceedings on issue of penalty,--upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized in s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (6) and (7). Any such evidence which

the court deems to have probative value may be received, regardless of its admissibility under the exclusionary fules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and;

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the

Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the persons.

(c) The defendant knowingly created a great risk or death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capicity of the defendant to appreciate

the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime."

STATEMENT OF THE CASE

The petitioner was arrested on November 11, 1977, for the charge of murder. A motion for mental exam and notice of defense of insanity was filed November 15, 1977. On November 22, 1977, the petitioner was committed to intake facilities for competency evaluations and was appointed experts to examine him on the issue of sanity. An additional psychiatric expert was appointed to examine the petitioner on March 3, 1978.

The trial began on June 19, 1978 and continued through June 21, 1978, as a result of which the jury returned verdicts of guilty as to murder in the first degree, sexual battery, and burglary.

On June 22, 1978, during an advisory sentencing proceeding, the petitioner testified on direct examination that he did not have a recollection of the events that occurred on the day of the murder. He further indicated that he did not remember committing the acts which were charged against him, but if he did commit them, that he was remorseful about them. The remaining direct examination dealt solely with the several times he was hospitalized for mental difficulties. (R-836, R-838) The prosecutor during this proceeding cross-examined the petitioner concerning facts raised only during a psychiatric mental examination, which was court ordered in this case. The questions of the prosecutor, rather than going to the issue of mental illness or insanity, went to factual matters of alleged acts of violence committed

by the petitioner during his military career in Okinawa. This information can be found only in the confidential reports of the psychiatrists, Drs. Barnard and Carrera.

It is clear that the prosecutor was referring to this confidential matter in the following exchange:

> Question: "Did you have any problems with acts of violence while you were in the service?"
> Answer: "Yes, I did."
> Question: "Other than needs for fighting, have you ever attempted to kill people?" (R-841.)
> Answer: "No."
> Question: "While you were in Okinawa in the houses?"
> Answer: "Could be."
> Question: "You know what I'm talking abount, Mr. Booker?"
> Answer: "Yes."
> Question: "I'm talking about houses of prostitution. Did you ever try to kill anybody over there?"
> Answer: "Not necessarily. I used to -- we used to rob cat houses."
> Question: "What weapons did you use to hit people with?"
> Answer: "Claw hammers." (R-842.)

During this June 22, 1978 advisory sentencing proceeding, the jury was instructed according to the standard jury instructions set out for Florida Statute section 921.141. After hearing the testimony and the court's instruction, the jury recommended death as punishment.

A motion for new trial was filed on behalf of the petitioner. Also, motions to exclude death as punishment; memorandum in support of motion; motion to declare section 922.10 of Florida Statutes unconstitutional were filed by the petitioner. On September 15, 1978, the trial court entered an order denying the petitioner's post trial motions.

On October 20, 1978, the trial court announced its judgment and sentence and sentenced the petitioner to death.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. On appeal to the Supreme Court of Florida, petitioner specifically urged that he was denied his protections

against self-incrimination as embodied in the Fifth Amendment of the United States Constitution when he was cross-examined concerning information gathered from a court ordered psychiatric examination. The Supreme Court of Florida stated that the petitioner testified on direct examination that he had "no recollection" as to what happened on the day of the homicide. The court also noted that the petitioner stated he had been hospitalized on eight times in the past and that during those times, he could not remember the reasons for being in the hospital. The Florida Supreme Court indicated that these statements on direct examination opened the door for the prosecutor to question the petitioner under the broad subject area of what the petitioner could or could not recollect. The Florida Supreme Court, however, did not comment on the relevancy of questionings directed towards recollections of an event in Okinawa some three years prior to the homicide and how such questions would be in any way helpful to the issues to be decided in that proceeding.

Defense counsel objected to the unfair use of such statements where the purpose was not the determination of sanity or insanity, but rather the attempted eliciting of information which did not fall within any statutory aggravating or mitigating circumstance and did not explore, through cross-examination, any area discussed on direct examination.

2. On appeal to the Supreme Court of Florida, the petitioner urged that Florida Statute section 921.141, provided insufficient constitutional standards of reliability in fact finding to justify the imposition of a death penalty as punishment, citing the case of Lockett v. Ohio, 438 U.S. 586 (1978). The Supreme Court of Florida held that this argument should be rejected out of hand. 397 So. 2d at 918.

3. On appeal to the Supreme Court of Florida, the petitioner urged that Florida Statute section 922.10 was unconstitutional in that it provided for punishment which was cruel and unusual, in violation of the Eighth Amendment to the United States Constitution. The Supreme Court of Florida rejected the contention that death by electrocution was cruel or unusual. 397 So. 2d at 918.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED HIS FIFTH AMENDMENT RIGHTS AGAINST SELF-INCRIMINATION WHEN HE WAS FORCED TO TESTIFY AS TO INFORMATION GATHERED FROM COURT ORDERED PSYCHIATRIC REPORTS.

In affirming petitioner's conviction, the Supreme Court of Florida decided a substantial "federal question in a way in conflict with applicable decisions of this Court." It held, contrary to Estelle v. Smith, 29 Cr.L. 3031 (May 18, 1981), that at the sentencing phase of a capital trial, the prosecution may use evidence based on psychiatric examinations when such information went to issues other than the question of sanity or insanity of the defendant. In the case at bar, the petitioner took the witness stand at the advisory sentence proceedings held on June 22, 1978. During cross-examination, counsel for the petitioner objected to questions based upon information within confidential psychiatric reports prepared by a court appointed expert. (R. 880)

The first objectionable area involved statements by the petitioner concerning previous acts of violence while in Okinawa in the Armed Forces. In a psychiatric report based on interviews with the petitioner, Dr. George Barnard (R-898) reported that the appellant was "asked if he had any

experience in real life where he had shown violence to others, and he replied that he had, while in the Army. He said that while in Okinawa he would go into towns and take a claw hammer with him; he would then tip-toe into a whore-house and beat anyone he could find."

In a supplemental report filed by Dr. Barnard, the same information was noted: "He was asked if he ever killed anyone else and he said no but he had hit people with a hammer and never found out what had happened to them. He thought he may have hit a dozen people in this manner on different occasions. This occurred in whorehouses while he was in Okinawa." (R-901)

Dr. Frank Carrera also interviewed the petitioner, pursuant to court order and stated in his report: "Mr. Booker denied killed anyone before. While stationed in Okinawa he said he used to go to whorehouses armed with a hammer and beat people with the hammer. He thought he might have done this a dozen times." (R-908)

It is clear that the prosecutor was referring to this confidential matter in the following exchange during cross-examination:

> Question: "Did you have problems with acts of violence while you were in the service?"
> Answer: "Yes, I did."
> Question: "Other than needs for fighting, have you ever attempted to kill people?" (R-841)
> Answer: "No."
> Question: "While you were in Okinawa in the houses?"
> Answer: "Could be."
> Question: "You know what I'm talking about, Mr. Booker?"
> Answer: "Yes."
> Question: "I'm talking about houses of prostitution. Did you ever try to kill anybody over there?"
> Answer: "Not necessarily. I used to -- we used to rob cat houses."
> Question: "What weapons did you use to hit people with?"
> Answer: "Claw hammers." (R-842)

The second area of contention concerns statements

about the morning of November 9, 1977. Dr. Barnard's report states: "On the day of the alleged crime, he awoke about 7:00 or 7:30 in the morning, and on that morning he specifically went to the houses of two different people in order to kill someone, but at each house decided against the act." (R-900) Dr. Carrera's report quotes: "I was mad that day . . . I got up at 7 o'clock or 7:30 . . . I went to kill somebody that morning . . ." (R-907)

Again, the prosecutor's cross-examination of the petitioner followed the psychiatric report:

> Question: "Mr. Booker, my question to you was do you remember when you got up at 7 o'clock or 7:30 feeling that morning like you wanted to kill somebody?"
> Answer: "Part of the way, yes." (R-844)
> Question: "Did you attempt to kill anyone else that day; do you remember that?"
> Answer: "Sure, I remember."
> Question: "Do you remember you did?"
> Answer: "No I didn't try to kill anybody that day."
> Question: "In the morning?"
> Answer: "Right."
> Question: "You did not?"
> Answer: "No, I didn't."
> Question: "Did you think about it?"
> Answer: "Sometimes I did, but I gave up the idea because it was crazy." (R-845)

The questions posed by the prosecutor in the case at bar were not addressed to the issue of sanity. These questions were specifically directed towards factual admissions made by the petitioner during court ordered psychiatric examinations.

The testimony of the petitioner during direct examination began with the statement that he did not have any recollection of the events that occured on November 9, 1977. The petitioner stated that although he did not remember committing the acts charged against him, if he did commit those acts, he was remorseful about them. (R-835) The remaining direct examination dealt solely with the several

times petitioner was hospitalized for mental difficulties. (R-836, R-838) The petitioner submits that this direct examination in no way opened the door for the prosecutor to inquire about specific information prejudicial to the petitioner when such inquiries were based upon information gained from confidential reports of court ordered psychiatric examinations.

This area of question has been commented on in the Federal Courts. In the case of Collins v. Auger, 428 F. Supp., (S.D. Iowa, 1977) the defendant, under criminal charge, had been committed to a hospital for mental treatment. During the trial, a treating physician was examined as to statements made during treatment. In discussing the concept of fundamental fairness the court stated: "In this court's opinion, it is fundamentally unfair to use defendant's incriminating admissions to a psychiatrist during a psychiatric examination as part of the prosecutor's case to prove his guilt . . . the fundamental unfairness of the introduction of such evidence violates defendant's right to due process under the Fourteenth Amendment to the Constitution of the United States.

Id. at P.1082.

The court said this unfair practice was analogous to using a defendant's testimony at a pre-trial suppression hearing in a trial to determine guilt, a procedure rejected by this court in Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.ED. 2d 1247 (1968). The Collins opinion further noted:

> "Congress solved this problem for federal courts in psychiatric examinations to determine a defendant's mental capacity to stand trial by providing: "No statements made by the accused in the course of

> any examination into his sanity or mental competancy provided for in this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.
>
> 18 U.SC. § 4244
>
> The object of the privilege against self incrimination is to (In)sure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed the crime. The privilege is limited to criminal matters, but is as broad as the mischief against which it seeks to guard."
>
> Counsel v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.ED. 1110 (1892). See also Maness v. Myers, 419 U.S. 449, 461; 95 S.Ct. 584, 42 L.ED. 2d 574 (1975)."
>
> Id. at p. 1083.

This Court in Estelle v. Smith, supra, held that the Fifth Amendment privilege against self-incrimination was directly involved when the State used as evidence against the respondent the substance of his disclosures given during a court ordered psychiatric examination. This opinion clearly stated that there was no basis for distinguishing between the guilt and penalty phases of trial insofar as the Fifth Amendment privilege is concerned.

II.

PETITIONER WAS DENIED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW BECAUSE FLORIDA STATUTE SECTION 921.141 PROVIDED INSUFFICIENT STANDARDS OF RELIABILITY IN THE FACT FINDING PROCESS.

The Fifth and Fourteenth Amendments to the United States Constitution provide that "no person . . . shall be deprived of life, liberty or property without due process of law". This Court in Lockett v. Ohio, 438 U.S. 586 (1978), reversed the proceedings of the Ohio Court systems to the extent that they sustained the imposition of the death

penalty in that case. Lockett struck down the Ohio death penalty statute and the plurality opinion concluded that the statute was too narrowly confined in the range of mitigating circumstances which the sentencing authority could consider. This same plurality opinion, authored by Chief Justice Berger, reviewed previous capital punishment decisions and noted that "the signals from this Court have not . . . always been easy to decipher". Justice Berger indicated in his decision that he wanted to put aside his "previously differing views" and attempt to unite a majority behind a clear rationale which the States could follow.

The Chief Justice wrote . . ."the penalty of death is qualitatively different from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed".

Id. at 3220.

Mr. Justice Marshall in his concurring opinion states "Permitting imposition of the death penalty solely on proof of felony - murder, moreover, necessarily leads to the kind of 'lightning bolt, freakish, and wanton' executions that persuaded other Members of the Court to join Mr. Justice Brennen and myself in Furman v. Georgia, 408 U.S. 238 (1972), in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony - murder liability) turns on fortuitous events do not distinguish intention or moral culpability of the defendants."

Mr. Justice White in his concurring opinion takes this one step further in stating ". . . that it violates the Eighth Amendment to impose the penalty of death without a

finding that the defendnat possessed a purpose to cause the death of the victim.

It is now established that a penalty constitutes cruel and unusual punishment if it is excessive in relation to the crime for which it is imposed."

The Justices in their opinions appear to indicate that the reliability in the process is mandatory before death is appropriate as a penalty. The further indications are that there is a distinction to be made between intentional premeditated murders and those that involved proof of a felony - murder situation and therefore, there is a need to have a factual distinction or finding made to determine which situation exists prior to the imposition of any death sentence for any killing.

Florida Statute 921.141 which provides the procedure by which mitigating and aggravating circumstances are to be considered by the jury in making a recommendation as to whether death is an appropriate penalty does not provide for any such fact findings to be made on the part of the jury.

The only guidance offered comes from the Florida Standard Jury Instruction at page 79:

> "Aggravating Circumstances must be established beyond a reasonable doubt before they may be considered by you."

However, there is no provisions for any specification as to which standard for evaluation of what degree some circumstances may outweigh one another.

It is inherent in the requirement that a jury is employed in this procedure that such evaluations should be mre than a mere numerical addition of aggravating and

mitigating circumstances. Nevertheless, Florida Statute Section 921.141 offers no guidance to a jury charged with rendering an advisory opinion. The advisory jury is not even required to state that they found as fact finders that the aggravating circumstances outweigh the mitigating circumstances by whatever standard they applied when advising the imposition of death as punishment.

Absent such findings of fact there is not a sufficient degree of reliability provided for a sentence which would be in proportion to the qualitative difference that exists between death and other penalties under the law.

III.

PETITIONER WAS DENIED HIS EIGHTH AMENDMENT RIGHTS IN A SENTENCE OF DEATH PURSUANT TO FLORIDA STATUTE SECTION 922.10

The petitioner was convicted of Murder in the First Degree under Section 782.04 (1)(a) Florida Statute (1975), a Capital felony requiring the imposition of a sentence of life imprisonment or death, Section 775.082, Florida Statute (1975). The sentencing procedure was governed by Section 921.141 Florida Statutes (1975) and death was the sentence imposed by the lower court. This sentence is mandated to be carried out by means of electrocution pursuant to Section 922.10 Florida Statutes (1975). The petitioner here asserts that death by electrocution is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and also in violation of Article I, Sections 9 and 17 of the Florida Constitution.

The Supreme Court in Gregg v. Georgia, 96 S.Ct. 2909, at 2925, (1976), stated the following:

> "A penalty . . . must accord with the 'the dignity of man', which is the basic concept underlining the Eighth Amendment. Trop v. Dulles, 356 U.S. at 100, 78 S.Ct. at 597 (Plurality Opinion). This means at least, that the punishment not be 'excessive'. When a form of punishment in the abstract . . . rather than in the particular . . . is under consideration, the inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Furman v. Georgia, 408 U.S. at 392, 393 92 S.Ct. at 2805 - 2806 . . . Second, the punishment must not be grossly and out of proportion to the severity of the crime."

The Gregg Court went on to say that although the legislature cannot be required to select the least severe penalty possible it shall be required to select a penalty which is not cruelly inhumane or disproportionent to the crime involved. The American Draftsmen who adopted the phrasing in the Eighth Amendment to the United States Constitution were primarily concerned with proscribing

"Tortures and other barbarous methods of punishment".

However, the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Gregg v. Georgia, supra.

Death by electrocution involves the unnecessary and wanton infliction of pain and does not meet the evolving standards of decency which mark the progress of our maturing society. There exists today means of execution which do not require the infliction of such needless pain and suffering. One example of a more humane means is that of lethal injection, now specifically prescribed by several of the states in our union and also urged for consideration by the present Attorney General for the State of Florida.

Conclusion

For the foregoing reasons, this writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEY OF RECORD

APPENDIX A

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397 So. 2d 910 (Fla. 1981)

especially heinous, atrocious, and cruel. *Id.* § 921.141(5)(h). The court found that there were no mitigating circumstances.

[11] The trial judge's finding that appellant was under sentence of imprisonment was based on the fact that he was on parole from prison. We hold that this fact, established by evidence, supports the finding of this aggravating circumstance.

[12] The trial judge's findings that the murder was committed in the course of a robbery and that it was committed for pecuniary gain are both based on the same aspect of the crime. Where such double recitation of aggravating circumstances based on a single aspect of the crime indicates that inflated consideration was accorded to the factor, it is error. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Where it is clear that the sentencing judge merely recited both statutory factors without giving improper double consideration to the single aspect in question, or where the absence of mitigating circumstances makes clear that any added weight accorded the factor did not tip the balance in favor of a sentence of death rather than life, the error of double recitation is harmless. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *Elledge v. State*, 346 So.2d 998 (Fla.1977). We approve the finding of one statutory aggravating circumstance based on the commission of murder in the course of the felony of robbery.

The trial judge's finding that the capital felony was especially heinous, atrocious, and cruel was based on evidence that appellant directly participated in the murder inflicted by multiple stab wounds and bludgeoning. The evidence supports the factual findings and the facts establish this statutory factor. *See, e. g., Washington v. State*, 362 So.2d 658 (Fla.1978), *cert. denied*, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979); *Funchess v. State*, 341 So.2d 762 (Fla.1975), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977).

Upon our review of the sentencing proceedings and the court's findings based on the whole record, we conclude that there was no prejudicial error in the sentencing phase and that the court properly found several aggravating circumstances and no mitigating circumstances. The sentence of death is proper.

The judgment of conviction of murder in the first degree is affirmed. The sentence of death, having been found to be appropriate to this case, is approved.

It is so ordered.

ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

SUNDBERG, C. J., concurs in result only.

Stephen Todd BOOKER, Appellant,

v.

STATE of Florida, Appellee.

No. 55568.

Supreme Court of Florida.

March 19, 1981.

Rehearing Denied June 2, 1981.

Defendant was convicted in the Circuit Court, Alachua County, John J. Crews, J., of murder in the first degree, sexual battery and burglary, and sentenced to death, and he appealed. The Supreme Court, Adkins, J., held that: (1) in sentencing procedure, trial court was correct in ruling that state attorney had right to inquire as to what defendant remembered; (2) photograph revealing knife protruding from victim's throat was admissible; (3) trial judge did not abuse his discretion in admitting card containing set of latent fingerprints lifted from closet door located inside bedroom of victim's apartment; (4) overwhelm-

ing circumstantial evidence demonstrated that defendant used force likely to cause serious bodily injury in commission of sexual battery; (5) State proved intent to commit a crime as required to support conviction of burglary with intent to commit larceny; (6) in sentencing proceeding, trial court did not take into account in "weighing process" any conceivable nonstatutory aggravating circumstances; (7) sentence of death was proper; (8) statute governing procedure when person is convicted of capital felony did not violate Constitution on ground that it attempted to govern practice and procedure; (9) death penalty statute was not too narrowly defined in range of mitigating circumstances which sentencing authority could consider; and (10) death by electrocution is not cruel and unusual punishment.

Affirmed.

1. Witnesses ⇐305(2)

Defendant who takes stand as witness in his own behalf occupies same status as any other witness, and all rules applicable to other witnesses are likewise applicable to him.

2. Witnesses ⇐305(2)

Defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to testimony he gives, and that waiver is no less effective or complete because defendant may have been motivated to take witness stand in first place only by reason of strength of lawful evidence adduced against him.

3. Criminal Law ⇐393(1)

In sentencing proceeding which resulted in death sentence, where defendant opened up question of what he remembered and whether he did or did not remember certain things, trial court was correct in ruling that state attorney had right to inquire as to what defendant remembered, and record did not conclusively show that state attorney secured this information from psychiatric reports, which defendant contended violated his right against self-incrimination. West's F.S.A. § 921.141.

4. Criminal Law ⇐438(1)

Photographs are admissible if they properly depict factual conditions relating to crime and if they are relevant in that they aid court and jury in finding truth.

5. Criminal Law ⇐438(6)

In prosecution which resulted in conviction for murder in the first degree, sexual battery and burglary, photograph revealing knife protruding from victim's throat was admissible in connection with testimony regarding causes of death, to show nature and extent of "force and violence" used to perpetrate crime, and premeditated and cold-blooded intent of defendant. West's F.S.A. § 810.02.

6. Criminal Law ⇐338(1), 1153(1)

Trial judge enjoys wide discretion in areas concerning admission of evidence, and his ruling on admissibility of evidence will not be disturbed unless abuse of discretion is shown.

7. Criminal Law ⇐339.6

In prosecution which resulted in conviction for murder in the first degree, sexual battery and burglary, trial judge did not abuse his discretion in admitting card containing set of latent fingerprints lifted from closet door located inside bedroom of victim's apartment. West's F.S.A. § 810.02.

8. Rape ⇐51(4)

Overwhelming circumstantial evidence demonstrated that defendant used force likely to cause serious bodily injury in commission of sexual battery.

9. Burglary ⇐41(3)

Conviction of burglary requires proof of intent to commit crime that was alleged. West's F.S.A. § 810.02.

10. Burglary ⇐41(3)

Evidence that bureau drawers, metal boxes and jewelry boxes were rummaged and apartment ransacked supported inference that defendant was in search of valuables and that his object was to steal them as required to support conviction of burglary with intent to commit larceny. West's F.S.A. §§ 810.02, 810.07.

11. Homicide ⇐354

Trial court, in sentencing defendant convicted of murder in the first degree to death, did not take into account in "weighing process" any conceivable nonstatutory aggravating circumstances, since alleged previous acts of violence brought out by cross-examination of defendant during sentencing proceedings were not considered. West's F.S.A. § 921.141.

12. Homicide ⇐354

Having found no mitigating circumstances and several aggravating circumstances, including factor that murder of which defendant was convicted was especially heinous, atrocious and cruel, trial judge properly imposed sentence of death. West's F.S.A. § 921.141.

13. Constitutional Law ⇐55
Criminal Law ⇐1206(1)

Statute governing procedure when person is convicted of capital felony does not violate Constitution because it attempts to govern practice and procedure. West's F.S.A. § 921.141; West's F.S.A.Const. Art. 5, § 2(a).

14. Criminal Law ⇐1206(1)

Death penalty statute was not too narrowly defined in range of mitigating circumstances which sentencing authority could consider, and directions given judge and jury by statute were sufficiently clear and precise to enable various aggravating circumstances to be weighed against mitigating ones. West's F.S.A. § 921.141.

15. Criminal Law ⇐1213

Death by electrocution is not cruel and unusual punishment. U.S.C.A.Const. Amend. 8.

Stephen N. Bernstein, Asst. Public Defender, Gainesville, for appellant.

Jim Smith, Atty. Gen., and Charles A. Stampelos, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is an appeal from a judgment adjudicating defendant guilty of murder in the first degree and an order imposing a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. (1972).

Defendant was also adjudged guilty of sexual battery and burglary, receiving a sentence of fifty-five years for sexual battery and thirty-five years for burglary.

The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment. Fingerprints of the defendant were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.

Test results indicated that body hairs found on the clothing of the defendant at the time of his arrest were consistent with hairs taken from the body of the victim.

After being given the appropriate warnings, the defendant made a statement, speaking as an alternative personality named "Aniel." The "Aniel" character made a statement that "Steve had done it."

The indictment returned by the grand jury charged defendant with murder in the first degree, sexual battery, and burglary. A motion for mental examination and notice of defense of insanity were filed on behalf of the defendant and he was examined by three psychiatrists.

The defendant entered a plea of not guilty, but did not testify during the guilt phase of the trial. He was found guilty on all three counts of the indictment.

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During the sentencing phase of the proceedings the defendant testified. At the conclusion of his testimony, and against the advice of his attorney, the defendant made a statement to the jury saying, "A defendant found guilty of such a crime should receive the death penalty." The jury recommended the death penalty and defendant was sentenced to death. This appeal resulted.

The defendant contends that during the sentencing proceedings the court committed error in permitting the prosecutor to ask questions based on information gathered from court ordered psychiatric reports. The defendant argues that this violated his right against self-incrimination. During the sentence hearing the defendant testified on direct examination that he had "no recollection" as to what happened on the day of the homicide. He stated that he had been hospitalized eight times in the past. During the times that he was hospitalized from the age of thirteen until now, the defendant said he could not remember the reasons for being in the hospital. He testified that on three of the occasions his lack of memory was "the reason for being in the hospital." On cross-examination the defendant testified that he did not consider himself a violent person, but that he did have problems with acts of violence while in the service. He denied that he attempted to kill people, but admitted that while in Okinawa he robbed houses of prostitution and used a claw hammer with which to hit people. He admitted that he hit about five people. The prosecutor then asked defendant if he remembered "getting up feeling like he wanted to kill someone that day." His counsel objected at that point, contending that the prosecutor was seeking to elicit information contained in the reports of the psychiatrist and such information was privileged. The court ruled that the question went toward the defendant's lapse of memory on the day of the incident and was proper cross-examination. Finally, when asked if he thought about killing anyone that day, the defendant responded, "Sometime I did, but I gave up the idea because it was crazy."

The defendant recognizes that a court ordered psychiatric examination generally is not considered violative of defendant's right to freedom from compelled self-incrimination and that psychiatrists may render opinions concerning sanity based on factual statements made by the defendant. However, the defendant points out that direct testimony concerning the facts surrounding a crime is prohibited where ascertained from a compulsive mental examination. Defendant relies upon *Parkin v. State*, 238 So.2d 817 (Fla.1970), in which we held that the trial court should prohibit a psychiatrist from testifying directly as to the facts surrounding the crime, where such facts have been elicited from the defendant during the course of a compulsory mental examination. We said that the state, in its inquiry of a court appointed psychiatrist, should not go beyond eliciting the opinion of the expert as to sanity or insanity and should not inquire as to information concerning the alleged offense provided by a defendant during his interview.

The defendant also cites *McMunn v. State*, 264 So.2d 868, 869 n.2 (Fla. 1st DCA 1972), where the court labeled as objectionable the question to the defendant, "[w]hether or not at that time and place you told Dr. Nelson the details of what happened that night including firing the shot?" The court also said that later impeachment testimony through the person of Dr. Nelson, the examining psychiatrist, was inadmissible. The defendant contends that the cross-examination of him by the prosecutor during the sentencing proceedings was based primarily upon information obtained from the report of the psychiatrist. This being privileged information, he argues that it was not subject to disclosure by cross-examination of defendant after he had taken the witness stand.

[1, 2] In *Parkin, supra*, we pointed out that if a defendant's counsel opens the inquiry to collateral issues, or admissions, or guilt, the state's redirect examination properly could inquire within the scope opened by the defense. The defendant took the

stand during the sentence proceedings, and presented the issue of whether he could remember certain events. When the defendant chose to testify in his own behalf during the sentence proceedings, the issue of guilt had been decided adversely to him. A defendant who takes the stand as a witness in his own behalf occupies the same status as any other witness, and all the rules applicable to other witnesses are likewise applicable to him. *Hoskins v. State*, 70 Fla. 186, 69 So. 701 (1915); *Faulkner v. State*, 151 So.2d 17 (Fla. 2d DCA), *cert. denied*, 156 So.2d 389 (Fla.1963). By taking the witness stand the defendant automatically subjected himself to cross-examination. *Kilgore v. State*, 271 So.2d 148 (Fla. 2d DCA 1972). A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

[3] During the cross-examination there was no reference made by the prosecutor to the psychiatrist or to the psychiatric reports. The defendant opened up the question of what he remembered and whether he did or did not remember certain things. The trial court was correct in ruling that the state attorney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings. Furthermore, the record does not conclusively show that the state attorney secured this information from the psychiatric reports.

During the course of the trial the state introduced into evidence two photographs of the victim as she was found at the scene of the crime. The defendant had no objection to the first photograph showing the position of the victim and the manner in which she was found. The second photograph was similar to the first but a cloth had been removed from the victim so as to reveal a knife protruding through the victim's throat. The defendant says that this photograph was so prejudicial as to render it inadmissible.

[4, 5] Photographs are admissible if they properly depict the factual conditions relating to the crime and if they are relevant in that they aid the court and jury in finding the truth. *Swan v. State*, 322 So.2d 485 (Fla.1975). The photograph was used in connection with testimony regarding the causes of death, *Henninger v. State*, 251 So.2d 862 (Fla.1971); the nature and extent of the "force and violence" used to perpetrate the crimes, *Alford v. State*, 307 So.2d 433 (Fla.1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976); and the premeditated and coldblooded intent of the defendant, *Foster v. State*, 369 So.2d 928 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979). The photograph was used for any or all of these three purposes, so making it relevant and admissible.

[6, 7] Investigator Terry lifted, among others, one particular set of latent fingerprints from a closet door located inside a bedroom of the victim's apartment. The latent fingerprints were placed on a card. The card was given by Terry to George Johnson, the latent examiner. Investigator Terry stated that the card was not in the same condition when it was introduced into evidence as when he lifted it. The fingerprint card was marked for identification. Investigator Terry did not make a similar comment regarding any other latent fingerprint card. George Johnson, the latent examiner, testified that he received the card from Investigator Terry; that he had the card in his custody until it was brought to court; and that it did not appear to be tampered with in any way. The trial judge enjoys wide discretion in areas concerning the admission of evidence. His ruling on the admissibility of evidence will not be disturbed unless an abuse of discretion is shown. *Rodriguez v. State*, 327 So.2d 903 (Fla. 3d DCA), *cert. denied*, 336 So.2d 1184 (Fla.1976); *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), *appeal dismissed*, 234

So.2d 120 (Fla.1969), *cert. denied* 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970). The defendant has failed to show an abuse of discretion by the trial judge in admitting the card into evidence.

[8] The defendant contends that a reasonable hypothesis of innocence exists on the question of whether or not actual physical force likely to cause bodily injury was used in the commission of the sexual battery. There was overwhelming circumstantial evidence demonstrating only one reasonable hypothesis, to wit: that defendant used force likely to cause serious bodily injury in the commission of the sexual battery. *See Hoy v. State*, 353 So.2d 826 (Fla. 1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978); *Jones v. State*, 332 So.2d 615 (Fla.1976); *Hallman v. State*, 305 So.2d 180 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

[9] The defendant seeks a reversal of his conviction of burglary with intent to commit larceny because the state failed to prove an intent to commit a crime. It is true that a conviction of burglary requires proof of an intent to commit the crime that was alleged. *Rumph v. State*, 248 So.2d 526 (Fla. 1st DCA 1971). There was no showing that any property was taken from the victim's home. In fact, cash in the amount of $370.00 was found in the home by police officers who arrived at the scene.

[10] "Burglary" means entering or remaining in a structure or conveyance with the intent to commit an offense therein. § 810.02, Fla.Stat. (1977). In a trial on the charge of burglary, proof of the entering of such structure at any time stealthily and without the consent of the owner is prima facie evidence of entering with intent to commit an offense. § 810.07, Fla.Stat. (1977). The evidence shows that bureau drawers, metal boxes, and jewelry boxes were rummaged. The apartment was ransacked. From this evidence the jury could infer that the defendant was in search of valuables and that his object was to steal them. *Walker v. State*, 44 Fla. 466, 32 So. 954 (1902). *See also Guerrero v. State*, 289 So.2d 396 (Fla.1974); *conformed to* 291 So.2d 103 (Fla. 3d DCA 1974). Intent, being a state of mind, must in most cases be inferred from the circumstances. *Edwards v. State*, 213 So.2d 274 (Fla. 3d DCA), *cert. denied*, 221 So.2d 746 (Fla.1968). The circumstances in the case *sub judice* are open to only one reasonable interpretation, *i.e.*, that the defendant entered the structure with intent to commit a larceny therein. The jury so concluded. The trial court did not instruct the jury on burglary with intent to commit *grand larceny*, so the charge was limited to the crime of breaking and entering the structure with the intent to commit petit larceny. The conviction of burglary is affirmed.

In attacking the death sentence the defendant says that the trial court improperly considered the alleged previous acts of violence brought out by the cross-examination of the defendant, for they were unauthorized aggravating factors. The state replies that the trial court considered only statutory aggravating circumstances. The findings of the trial judge read as follows:

MITIGATING CIRCUMSTANCES

(a) Whether the defendant has no significant history of prior criminal activity. *Finding:*

As a juvenile, Booker came to the attention of authorities for assaultive tendencies, truancy and theft. He was committed at least once to the Youth Center in New York and was given six months probation. He began using drugs of all kinds except "speed" when he was 13 years of age.

The Defendant had one confirmed Army 15 involving violence to another.

On November 12, 1974, the Defendant was sentenced in the Circuit Court, Collier County, Florida to five years in the state penal institutions for the offense of Robbery (strong arm)[.]

(b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Finding:

Booker knew and was able to understand the nature, quality, and wrongfulness of his acts on November 9, 1977; was able to understand the charges against him; and was able to adequately cooperate with and assist his counsel in his defense at trial.

Booker has been an antisocial, hostile, somewhat paranoid individual who learned at an early age that "he could easily obtain what he wanted by illegal means and that he could control others through fear and manipulation."

There was argument of counsel, but no evidence whatever of extreme mental or emotional disturbance during the commission of the murder. [Refer to mitigation finding (e).] (brackets in original).

(c) Whether the victim, LORINE DEMOSS HARMON, was a participant in the defendant's conduct or consented to the act(s)[.]

Finding:

The victim did not at any time nor in any way consent to or participate in the conduct of defendant and his acts.

(d) Whether the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

Finding:

Booker was not an accomplice. No one else was involved, directly or indirectly. He was the aggressive perpetrator of the burglary of the dwelling, the sexual battery, and the murder.

(e) Whether the Defendant acted under extreme duress or under the substantial domination of another person.

Finding:

The Defendant did not act under the domination—not to mention—substantial domination of another person. The "Aniel syndrome" whereby Booker claimed that "Aniel" did it is and was irrelevant, most likely self-serving, and the evidence is bereft of any believable fact that the Defendant was being dominated by "Aniel" or anyone. To the contrary, he was the manipulative master of his acts at the time of the crimes.

Though the Defendant consumed intoxicants before the murder and may have experienced the "Aniel' phenomenon afterward, there isn't any evidence that he was under extreme duress at the time of the crimes.

(f) Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Finding:

At the time of the commission of the capital felony the Defendant's capacity to appreciate the criminality and to conform his conduct to requirements of law was not substantially impaired [Refer to mitigation finding (b).] (Brackets in original).

"(g) The age of the Defendant at the time of the crime."

Finding:

Booker was in his majority at the age of twenty-four years at the time of the crime(s). Therefore, age had no particular significance and is not a mitigating circumstance.

AGGRAVATION

(a) Whether the defendant was under sentence of imprisonment when the defendant committed the murder of which the defendant has been convicted.

Finding:

Booker was not under sentence of imprisonment when he committed the murder for which he has been convicted.

(b) Whether the defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person.

Finding:

The defendant had been previously convicted of a felony involving the use of threat of violence to another.

(c) Whether, in committing the murder of which the defendant has been convicted, the defendant knowingly created a great risk of death to many persons.

Finding:

The Court does not consider the above provision in the Statute applicable to the defendant as an aggravating circumstance.

(d) Whether the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any burglary or rape.

Finding:

The stabbing which caused the death of LORINE DEMOSS HARMAN took place immediately after the vaginal penetration of her by the sex organ of STEPHEN TODD BOOKER. The other wounds took place while or immediately before and after completion of the crime of sexual battery. The capital murder also took place after Booker committed the felony of burglary of a dwelling as charged in Count III of the Indictment, and before he completed his flight from said crime.

(e) Whether the murder of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Finding:

The murder was not committed for the latter of these purposes, but, among other reasons, was committed for the purpose of avoiding or preventing a lawful arrest. [See aggravation paragraph below (h).] (Brackets in original).

(f) Whether the murder of which the defendant has been convicted was committed for pecuniary gain.

Finding:

There isn't evidence that the capital murder was committed for pecuniary gain though Booker did obtain personal property of his victim, and he thoroughly searched her apartment for whatever he wanted.

(g) Whether the murder of which the defendant has been convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

Finding:

Not applicable as an aggravating circumstance.

(h) Whether the murder of which the defendant was convicted was especially heinous, atrocious or cruel.

Finding:

LORINE DEMOSS HARMAN was 94 years of age at the time of her death. She was active, alert, spry, enjoyed playing bridge on a regular basis with her friends, participated in church and other wholesome activities, preferred to take care of herself in her own apartment, to come and go in her pursuit of happiness and looked forward, as most others do, to the enjoyment of life.

Booker did not know Mrs. Harman. When she returned from visiting with friends, the defendant severely beat, wounded, raped and finally killed her, but his aggressive, antisocial hatred had not yet been satiated, hence, she was stabbed in the throat before death and after suffering the horrible indignities inflicted upon a lady who had not previously confronted such a gross animal-like fiend.

It is manifest from her picture in death that she suffered greatly in body and mind, knowing that her death was near and by reason of degrading inhuman cruelty.

There were seven stab wounds in her chest with one knife left embedded to its handle. There were no fewer than two stabs in her throat with a butcher knife left sticking through that part of her anatomy. There were other wounds and contusions with internal bleeding consistent with the outrageous beating of a 90-pound female by a strong overpowering male[.] Beyond gainsay, this cold, calculated capital murder was especially heinous, atrocious and cruel.

ACCORDINGLY, the Court further finds that there are insufficient mitigating circumstances to outweigh the aggravating circumstances which are sufficient to require the pronouncement of sentence hereinafter made.

The Court further finds that considering the facts and circumstances of this case a sentence less than that hereinafter pronounced would be insufficient, as Defendant himself stated.

[11] There were no mitigating circumstances to be weighed against the aggravating circumstances. The defendant's reliance on *Elledge v. State*, 346 So.2d 998 (Fla.1977), is misplaced because the record reveals that the trial court did not take into account in the "weighing process" any conceivable non-statutory aggravating circumstances. The questions posed to the defendant during cross-examination were used to negate a mitigating circumstance, *i.e.*, that defendant had a significant history of prior criminal activity. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Knight v. State*, 338 So.2d 201 (Fla. 1976); *Meeks v. State*, 336 So.2d 1142 (Fla. 1976). When the defendant elects to testify during the sentencing proceedings, it is appropriate for the prosecutor to cross-examine him concerning previous criminal activity. Unless this mitigating factor is negated, there would be a presumption that defendant had not engaged in any previous criminal activity. It is apparent from an examination of the findings of the court that this evidence was not considered as an aggravating factor. The principles announced in *Elledge, supra*, and *Mikenas v. State*, 367 So.2d 606 (Fla.1978), are not applicable.

[12] The jury recommended a sentence of death. The trial judge recited that he found no mitigating circumstances. The trial court found several aggravating circumstances, including the factor that the murder of which defendant was convicted was especially heinous, atrocious, and cruel. The sentence of death was proper.

[13] Contrary to defendant's contention, we have held that section 921.141, Florida Statutes (1977), does not violate the requirements of article V, section 2(a), Florida Constitution, because it attempts to govern practice and procedure. *Dobbert v. State*, 375 So.2d 1069 (Fla.1979), *cert. denied*, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980).

[14] In light of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 923 (1978), the defendant says that Florida's death penalty statute is too narrowly defined in the range of mitigating circumstances which the sentencing authority may consider. This argument was rejected by this Court in *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Also, the directions given to the judge and the jury by the Florida statute were sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). *See also State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

[15] Finally, we reject defendant's contention that death by electrocution is cruel and unusual punishment. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947); *Spinkellink v. Wainwright, supra*.

The judgments and sentences of the lower court are affirmed.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

Opposition

ORIGINAL

NO. 81-5086

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

STEPHEN TODD BOOKER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER PETITIONER, WHO VOLUNTARILY TESTIFIED DURING THE SENTENCING PHASE OF HIS CAPITAL MURDER TRIAL AND WAS CROSS-EXAMINED BY THE STATE ON MATTERS WHICH HAD BEEN BROUGHT OUT ON DIRECT EXAMINATION BY DEFENSE COUNSEL, HAD WAIVED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION?

2. WHETHER § 921.141, FLA.STAT., DENIED PETITIONER DUE PROCESS OF LAW IN THE SENTENCING PHASE OF HIS CAPITAL MURDER TRIAL WHEN THE JURY RETURNED AN ADVISORY VERDICT TO THE TRIAL COURT AFTER DETERMINING WHETHER THERE WERE SUFFICIENT MITIGATING CIRCUMSTANCES TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES FOUND TO HAVE EXISTED?

3. WHETHER PETITIONER'S SENTENCE OF DEATH BY ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

PARTIES

In the Supreme Court of Florida, Petitioner was the appellant and the State of Florida was the appellee.

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§ 921.141, Fla.Stat. 1,7

28 U.S.C. § 1257(3) 3

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as Booker v. State, 397 So.2d 910 (Fla. 1981).

STATEMENT OF THE CASE

Respondent does not accept Petitioner's Statement of the Case and instead tenders the following statement of the case and facts as set forth by the Supreme Court of Florida in its opinion in Booker v. State, 397 So.2d 910 (Fla. 1981):

> This is an appeal from a judgment adjudicating defendant guilty of murder in the first degree and an order imposing a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. (1972).
>
> Defendant was also adjudged guilty of sexual battery and burglary, receiving a sentence of fifty-five years for sexual battery and thirty-five years for burglary.
>
> The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment. Fingerprints of the defendant were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.
>
> Test results indicated that body hairs found on the clothing of the defendant at the time of his arrest were consistent with hairs taken from the body of the victim.
>
> After being given the appropriate warnings, the defendant made a statement, speaking as an alternative personality named "Aniel." The

"Aniel" character made a statement that "Steve had done it."

The indictment returned by the grand jury charged defendant with murder in the first degree, sexual battery, and burglary. A motion for mental examination and notice of defense of insanity were filed on behalf of the defendant and he was examined by three psychiatrists.

The defendant entered a plea of not guilty, but did not testify during the guilt phase of the trial. He was found guilty on all three counts of the indictment.

During the sentencing phase of the proceedings the defendant testified. At the conclusion of his testimony, and against the advice of his attorney, the defendant made a statement to the jury saying, "A defendant found guilty of such a crime should receive the death penalty." The jury recommended the death penalty and defendant was sentenced to death. This appeal resulted.

The defendant contends that during the sentencing proceedings the court committed error in permitting the prosecutor to ask questions based on information gathered from court ordered psychiatric reports. The defendant argues that this violated his right against self-incrimination. During the sentence hearing the defendant testified on direct examination that he had "no recollection" as to what happened on the day of the homicide. He stated that he had been hospitalized eight times in the past. During the times that he was hospitalized from the age of thirteen until now, the defendant said he could not remember the reasons for being in the hospital. He testified that on three of the occasions his lack of memory was "the reason for being in the hospital." On cross-examination the defendant testified that he did not consider himself a violent person, but that he did have problems with acts of violence while in the service. He denied that he attempted to kill people, but admitted that while in Okinawa he robbed houses of prostitution and used a claw hammer with which to hit people. He admitted that he hit about five people. The prosecutor then asked defendant if he remembered "getting up feeling like he wanted to kill someone that day." His counsel objected at that point, contending that the prosecutor was seeking to

> elicit information contained in the reports of the psychiatrist and such information was privileged. The court ruled that the question went toward the defendant's lapse of memory on the day of the incident and was proper cross-examination. Finally, when asked if he thought about killing anyone that day, the defendant responded, "Sometime I did, but I gave up the idea because it was crazy."

Id. at 912,913.

JURISDICTION

The jurisdiction of this Court is asserted under 28 U.S.C. §1257(3).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

PETITIONER WAS NOT DENIED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WHEN THE STATE WAS ALLOWED TO CROSS-EXAMINE HIM CONCERNING MATTERS BROUGHT OUT ON DIRECT EXAMINATION BY DEFENSE COUNSEL AFTER PETITIONER VOLUNTARILY TESTIFIED DURING THE SENTENCING PHASE OF HIS TRIAL.

Petitioner has contended that he was denied his Fifth and Fourteenth Amendment right against self-incrimination when he was cross-examined by the State after he voluntarily testified during the sentencing phase of his trial. The substance of Petitioner's complaint is his contention that he was cross-examined on confidential material found only in psychiatric reports. However, the Supreme Court of Florida found that the record did not support Petitioner's contention:

> During the cross-examination there was no reference made by the prosecutor to the psychiatrist or to the psychiatric reports. The defendant opened up the question of what he remembered and whether he

> did or did not remember certain things. The trial court was correct in ruling that the state attorney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings. Furthermore, the record does not conclusively show that the state attorney secured this information from the psychiatric reports.

Id. at 914.

Moreover, it is not clear that Petitioner's objection was preserved as required by Florida's contemporaneous objection rule. Wainwright v. Sykes, 433 U.S. 72 (1977). The State's cross-examination of Petitioner began with general questions concerning Petitioner's hospitalization for mental difficulties. The fact that Petitioner had been hospitalized at least three times for mental problems was brought out on direct examination by defense counsel (R 836). Petitioner also volunteered that he had been hospitalized twice while in the Army in Okinawa (R 837). The State then cross-examined Petitioner about his activities in Okinawa which involved going into houses of prostitution and striking people with claw hammers. This testimony was not objected to (R 842). Cross-examination continued concerning Petitioner's alcohol problems and the fact that he had been in an alcohol treatment center in Gainesville prior to his commission of the murder (R 843). It was not until the State questioned Petitioner about his activities on the day of the murder that defense counsel objected. The record reveals that there was an unreported bench conference (R 844). At the conclusion of the cross-examination and after the jury had been instructed, Petitioner's counsel stated his objections for the record. However, counsel's specific objection concerned questions about the day of the murder rather than what had occurred in Okinawa:

> MR. BERNSTEIN: Your Honor, for the record if I may--
>
> THE COURT: Yes. It was under-

> stood that you had a motion that you would make at this time that would be considered the same as if you had made it at the appropriate time.
>
> MR. BERNSTEIN: Thank you, Your Honor. At this time I would move to strike all of the cross-examination on the part of Mr. Hebert I had based on confidential information supplied by psychiatric reports in this case. Specifically I refer to questions that related to activities during the morning of November 9th, 1977 and what actions took place during that morning or what statements may have been made or what thoughts may have been had.

(R 880).

The assistant state attorney argued that he had not mentioned the psychiatric reports, and he stated that some of the questions had come from sources other than the psychiatric reports (R 881). In any event, the trial court ruled that defense counsel had opened up the questions concerning Petitioner's memory (R 882), and Petitioner's motion to strike was denied. The State has included Petitioner's direct examination during the sentencing phase and the relevant portion of the cross-examination in the Appendix (A 1-10). Also, defense counsel's motion to strike and the trial court's ruling have been included at pages (A 11-13).

Should, however, the court decline to find that a valid and independent state ground exists on this point because of Pettioner's failure to comply with Florida's contemporaneous objection rule, Petitioner's argument must fail on the merits. This is because Petitioner voluntarily testified, and it is fundamental that a defendant who chooses to testify waives his privilege against compulsory self-incrimination, regardless of why the defendant was motivated to testify. Harrison v. United States, 392 U.S: 219, 222 (1968). The Court has previously held that a defendant's statements made in response to proper cross-

examination which is reasonably suggested by the defendant's direct examination are subject to impeachment by the prosecution -- even if the evidence used to impeach has been illegally obtained or is otherwise inadmissible as substantive evidence of guilt during the prosecution's direct case. United States v. Havens, 446 U.S. 620, 628 (1980). When defense counsel opens the door during direct examination, a criminal defendant's credibility can be attacked by the prosecution just like any other witness. Walder v. United States, 347 U.S. 62 (1954).

Finally, Petitioner's case does not present the issue decided in Estelle v. Smith, ___ U.S. , ___ 68 L.Ed.2d 359 (1981). In that case, the state used psychiatric reports during the sentencing phase as evidence of "future dangerousness" to support the imposition of the death penalty. In Petitioner's case, however, there was no direct mention of the psychiatric reports and the questions now found objectionable stemmed from matters brought out on direct examination by defense counsel. It should also be noted that the psychiatrists' reports were requested by the Petitioner who filed a Motion for Mental Examination and Notice of Defense of Insanity approximately one week after the murder (R 4-5, A- 14-15). See Estelle v. Smith, supra, at 68 L.Ed.2d 370, where the Court stated that in a similar type context the F h Amendment does not become an issue.

In summary, the Supreme Court of Florida found that the record did not conclusively show that the objected to testimony concerned information derived only from psychiatric reports. The Supreme Court of Florida also found that Petitioner had voluntarily waived his right against self-incrimination when he took the stand and testified during the sentencing phase of the trial. These conclusions are supported by the record and do not present a substantial federal question. Review should not be granted on this issue.

II

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW DURING THE SENTENCING PHASE OF HIS CAPITAL MURDER TRIAL WHEN THE JURY RETURNED AN ADVISORY VERDICT TO THE TRIAL COURT AFTER DETERMINING WHETHER THERE WERE SUFFICIENT MITIGATING CIRCUMSTANCES TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

Petitioner next contends that he was denied due process of law because § 921.141, Fla.Stat., provides insufficient standards of reliability in the fact finding process. Apparently, the gravamen of Petitioner's complaint is that the jury which renders an advisory opinion concerning whether the death penalty should be imposed is not provided sufficient standards from which to make its recommendation.

However, this argument has previously been raised and has been squarely rejected by this Court. In Proffitt v. Florida, 428 U.S. 242, 258 (1976), the Court stated:

> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Id.

Moreover, Petitioner has overlooked the fact that it is the trial court, not the jury, which is the sentencing authority in Florida. As this Court noted in Proffitt, supra, judicial sentencing should be even more consistent in the imposition of a capital sentence because a trial judge is more experienced in sentencing than a jury. Id. at 428 U.S. 252. As this Court found in Proffitt, Florida's trial judges are afforded specific and detailed guidance to assist them in determining whether to impose a death sentence or sentence of life imprisonment. Id.

at 428 U.S. 253. Florida's death penalty statute has passed constitutional muster, and Petitioner has failed to demonstrate that he was denied due process of law. Review should not be granted on this point.

III

WHETHER PETITIONER'S SENTENCE OF DEATH BY ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

Petitioner's final argument concerns his unsupported contention that death by electrocution constitutes cruel and unusual punishment. This argument has also been squarely rejected by this Court several times. See In Re: Kemmler, 136 U.S. 436 (1890); McElvaine v. Brush, 142 U.S. 155 (1891); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

CONCLUSION

Petitioner's argument that he was denied his Fifth Amendment right against self-incrimination is without merit. He voluntarily testified in his own behalf, and his testimony opened the door for cross-examination upon matters brought out on direct examination. Thus, he waived his right against compulsory self-incrimination. Harrison, supra. Second, Petitioner's contention that he was denied due process of law because of the sentencing procedure is also without merit. This is because in Florida the trial court is the authority which imposes the sentence of death and because this Court has already concluded that Florida's death penalty statute meets constitutional muster. Finally, Petitioner's third argument must fail because death by electrocution does not constitute cruel and unusual punishment. In Re: Kemmler, supra.

Respectfully submitted:

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to STEPHEN N. BERNSTEIN, 725 N.E. 1st Street, Gainesville, FL 32601, Counsel for Petitioner, by U. S. Mail this 25th day of September, 1981.

GEORGE R. GEORGIEFF
Assistant Attorney General

OF COUNSEL.

NO. 81-5086

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

STEPHEN TODD BOOKER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

APPENDIX TO

Brief in Opposition to Petition

For Writ of Certiorari

EVIDENCE BY THE DEFENSE

(Thereupon, STEPHEN TODD BOOKER, called as a witness on behalf of the Defense, being first duly sworn, testified as follows:)

DIRECT EXAMINATION

BY MR. BERNSTEIN:

Q Mr. Booker, you have sat at this table with me for the past three days and heard a lot of testimony concerning the events surrounding this charge and the allegations against you. And you have heard the jury's verdict. Do you have a recollection of your own of what happened on November 9th?

A No. I don't.

Q No, you don't?

A No, sir.

Q If you in fact committed the acts since you don't remember as has been found by this jury as has been alleged by the State and charged in this case, do you have any feelings of remorse in regards to these possible acts?

A Yes. If I committed them I would be remorseful.

Q At this time are you denying that you committed the acts alleged?

A I don't remember.

Q Mr. Booker, have you ever been hospitalized before?

A Yes, eight times.

Q All right. Have you ever been hospitalized for mental difficulties?

A Eight times.

Q When or how old were you when the first occasion transpired when you were hospitalized for mental difficulties?

A I'm not certain, 13 or 14 years old.

Q I am going to ask that you speak a little bit louder so everyone can hear.

Do you recall how old you were on the second occasion that you were hospitalized?

A Fourteen or fifteen, more like fifteen.

Q Can you remember the third time you were hospitalized?

A This was 19.

Q Now these instances that you refer to when you were 13 and 15 and 19, do you recall where you were hospitalized?

A Yes, sir. The first two times I was hospitalized in Kings County G Building in Brooklyn, New York.

Q Were these at a mental facility?

A Yes, sir.

Q Do you remember the fourth time you were hospitalized?

A The third time was Camp Codie Medical Center on Okinawa.

Q That was the third time?

A Yes, sir.

Q That was when you were 19?

A Yes, sir.

Q When was the fourth time?

A Stil 19 at Camp Codie Medical Center on Okinawa.

Q Okay. And the fifth time?

A Walter Reed Medical Center in Washington, D.C.

Q All right. Now you heard Dr. Carrera testify about papers that dealt with a time when you were committed to Walter Reed in his testimony when you were in the service. Is this the same hospital we are talking about?

A Yes, sir.

Q And that was from June until August of 1973?

A Yes, sir.

Q Do you remember this sixth time that you were hospitalized?

A I don't know the name of the hospital, but it was at Fort Dix Army Post in New Jersey.

Q Do you remember when that was?

A '73 again.

Q Do you remember the seventh time you were hospitalized?

A 1974, Fort Dix, same hospital.

Q And the eighth time that you were hospitalized.

A It must be nine times. I just remember that after

I got out of the service I went back to Kings County Hospital G Building in '74.

Q '74?

A Yes, sir.

Q And the final time you can remember is when?

A Here in Gainesville Alachua General.

Q Do you remember when that was?

A It was in November of last year.

Q Was it shortly after you were arrested?

A Yes, sir.

Q Have you had any difficulties during this time you were hospitalized from the time you were 13 until now with periods of time which you can't remember?

A Yes, sir. Three of these occasions of hospitalization, that was the reason for being in the hospital.

Q That you couldn't remember what had happened to you?

A Yes, sir.

Q There was also evidence presented at the trial that you had problems with alcohol. Have you experienced to your knowledge a problem with alcohol?

A Yes, sir.

Q Is it a chronic problem with alcohol?

A I don't readily admit that it was chronic, but this is what all the doctors and evaluations of me have said.

Q Mr. Booker, in relation to this case, if you were given the opportunity prior to going to trial to enter a plea of guilty to the charge of murder in the second degree, would you have taken that opportunity?

MR. HEBERT: The State objects. That is irrelevant and immaterial.

THE COURT: The objection is sustained because now what you have gone so far may go to the state of mind as in the second paragraph of mitigating circumstances. This would be immaterial.

MR. BERNSTEIN: Your Honor, I would submit that although this may be outside the spectrum of mitigating circumstances listed in the statute, that it is still material to the question of what the jury will be deciding today and what recommendations they will make. I believe the case law allows -- I believe the case is Province v. State, and I will be glad to cite it for the Court.

THE COURT: I don't allow that which the Court may deem material.

MR. BERNSTEIN: Yes, sir I would admit to the Court I think it's outside the mitigating circumstances listed in the statute, but I think it is still material and relevant to the issue.

MR. HEBERT: Your Honor, there has been no offer

to a plea of a lesser charge, and the fact that he would have taken one if it had been offered is irrelevant.

MR. BERNSTEIN: I don't believe it would be irrelevant. I would certainly admit that the State has never offered that.

THE COURT: Well, then we won't go into it.

MR. BERNSTEIN: Yes, sir. Your Honor, that would be all the questions I have of Mr. Booker.

CROSS-EXAMINATION

BY MR. HEBERT:

Q Mr. Booker, you indicated that you were hospitalized when you were about 14 or 15 years old.

A Thirteen or fourteen the first time.

Q Okay. On either of those times, 13, 14, or 15 year of your life when you were hospitalized, was that because of some act you committed or because you volunteered, turned yourself in to somebody?

A No. It was because my mother turned me in.

Q Because you were a problem to the Court or a problem at home?

A I had a little trouble with juvenile courts concerning I was suffering from acute alcoholism.

Q All right. Now, you said that you were hospitalized

one time in Okinawa.

A Twice.

Q Excuse me, twice. Is that when you were in the military?

A Yes, sir.

Q When did you go in the military? How old were you?

A Seventeen years old, in December of 1970.

Q How long did you stay in the military?

A Three years and two months.

Q During that period of time how many Article 15's did you have?

A Then 11.

Q How many court-martials did you have?

A One.

Q Your discharge was non-medical; wasn't it?

A Honorable discharge.

Q Not for medical reasons?

A No, sir.

Q Do you consider yourself a violent person?

A Not necessarily, no.

Q Do you have problems with acts of violence while you were in the service?

A Yes. I did.

Q Other than these for fighting, have you ever attempted to kill people?

A No.

Q While you were in Okinawa in the houses?

A Could be.

Q You know what I am talking about, Mr. Booker?

A Yes.

Q I am talking about houses of prostitution. Did you ever try to kill anybody over there?

A Not necessarily. I used to -- we used to rob cat houses.

Q What weapons did you use to hit people with?

A Claw hammer.

Q How many people do you think you hit with the claw hammer?

A I can't recollect.

Q More than five?

A I would say about five.

Q More than ten?

A No.

Q When you were in these hospitals, did you pay for your treatment there or was that paid by the county or state?

A Which hospital?

Q Any one of them. Did you pay for any of these treatments? Was this paid by the county or state?

A The county hospital I guess was paid for by the

county and military by the government.

Q In the county hospital or state hospital you didn't pay bills yourself for those sessions did you?

A No. I didn't.

Q Now, you said you had an alcohol problem. Was that here in Alachua County that you had it as well as other places? You had it in other places?

A Yes, sir. I did.

Q Did you go to the Alcothon House here?

A Yes, sir.

Q Did you pay for those services during you stay there?

A Some I have. When I was employed I paid.

Q When were you employed?

A During residency there.

Q How long were you in Alcothon?

A I was there probably a month and a half.

Q And how much of the time of that were you employed?

A Week and a half.

Q The rest of the time the county paid for the services; is that true.

A I imagine that's true.

THE COURT: A little louder, Mr. Booker. It is difficult for the court reporter to hear, and I also need to hear.

Q Mr. Booker, on this morning that this lady was killed, November 9th, 1977, a Wednesday, do you remember getting up that morning at 7:00 or 7:30?

A Yes. I do.

Q Do you remember getting up feeling like you wanted to kill somebody that day?

MR. BERNSTEIN: Your Honor, I am going to object at this time and ask to approach the Bench.

(Thereupon, counsel and the Court conferred at the sidebar off the record and out of the hearing of the jury and the reporter.)

THE COURT: The ruling of the Court since that goes to the question of lapse of memory on the day of the incident that was opened by the defendant is that the question may be asked.

Q Mr. Booker, my question to you was do you remember when you got up at 7:00 or 7:30 feeling that morning like you wanted to kill somebody?

A Part of the way, yes.

Q Did you know Mrs. Harmon prior to this date?

A No. I didn't.

Q Had she ever done anything to you in her life to deny you anything or prevent you from anything?

A No. In regards to me knowing her, I still don't know her. I have just been confronted with her in this

THE COURT: All right.

MR. BERNSTEIN: Your Honor, for the record if I may --

THE COURT: Yes. It was understood that you had a motion that you would make at this time that would be considered the same as if you had made it at the appropriate time.

MR. BERNSTEIN: Thank you, Your Honor. At this time I would move to strike all of the cross-examination on the part of Mr. Hebert I had based on confidential information supplied by psychiatric reports in this case. Specifically I refer to questions that related to activities during the morning of November 9th, 1977 and what actions took place during that morning or what statements may have been made or what thoughts may have been had.

It is my understanding at this time from my information, from my experience, and from my discovery that this information came out during those confidential conversations with the psychiatrist and revealed through those recommendations and opinions filed closed in the sense that the Court ordered them closed and confidential in this particular case which defense counsel and counsel for the State Attorney's Office, of course, had access to.

I think it's improper to use those as a basis for questions in this proceeding and move to strike all those questions and all answers responded thereto, and move for mistrial on the basis of the fact that those questions were stated in front of the jury.

THE COURT: Mr. Hebert.

MR. HEBERT: Your Honor, the information that I asked the defendant he could answer or deny. He could admit it or deny it. And I would have been stuck without the ability to present rebuttal testimony should he deny it. I didn't ask if they were in the psychiatric report or not. I asked of the morning. As a matter of fact, some of the testimony that was used came from Officer Mick Price's interviews of the defendant. not as to how he felt, but what he did that morning excluding the drinking.

Now, the questions when asked of the defendant should he deny that he had such feelings or thoughts or activities, I agree I would have been stuck with his answer. The defendant chose to answer the way he did. I find nothing irregular about that.

MR. BERNSTEIN: My objection is not that the defendant answered truthfully or not truthfully. The question was proffered and I think the subject matter of information came out of the confidential reports.

THE COURT: I don't know that, but I know this: that was the ruling of the Court at the time, and I told you at the sidebar that it would be the ruling of the Court that you opened up the question of what the defendant remembered and how well he did not remember certain things and how well he did remember certain things.

And accordingly it was the judgment and ruling of the Court that the State Attorney that having been opened had a right to inquire as to what he remembered about that date and that only. He could not go any further than that, and he was instructed not to go further than that.

I thank you very much, gentlemen. You have your record. Motion for mistrial is denied. And motion to strike is denied. Court will be in recess.

(Thereupon, the Court took a recess at 3:00 p.m.; whereupon, the following proceedings were had at 4:00 p.m. in the presence of the jury and all Court personnel:)

THE COURT: All necessary parties present and the jury in, ladies and gentlemen of the jury, have you arrived at your advisory sentence?

THE FOREMAN: Yes, sir.

THE COURT: Kindly hand the advisory sentence to the Clerk.

(Thereupon, the advisory sentence was handed to

IN THE COUNTY COURT OF THE
EIGHTH JUDICIAL CIRCUIT, IN AND
FOR ALACHUA COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

vs. Case No. 77-2332-CF

STEPHEN T. BOOKER,

Defendant.

FILED
1977 NOV 15 AM 11:05
CLERK CIRCUIT & COUNTY COURT
ALACHUA CO., FLA.

MOTION FOR MENTAL EXAMINATION AND
NOTICE OF DEFENSE OF INSANITY

COMES NOW the Defendant, STEPHEN T. BOOKER, by and through his undersigned Attorney, and respectfully moves this Honorable Court pursuant to Section 914.06 of the Florida Statutes to appoint two qualified psychiatrists to examine the Defendant to determine whether he was insane at the time of the alleged offense, and whether the Defendant is presently insane. In support of this motion it is alleged to the Court:

1. That the State is not opposed to this Motion and, in fact, is willing to stipulate to the factual basis for the Motion.

2. That the Defendant has provided statements to Law Enforcement Officials in which he has taken on at least two different personalitites.

3. That the Defendant has seriously attempted to commit suicide while being incarcerated in the Alachua County Adult Detention Center.

4. That pursuant to Section 925.10 (1)(a)(1) of the Florida Statute, (1977), the Defendant meets the criteria for involuntary hospitilization.

5. That on October 17, 1977, in the State of Florida v. Boyd, the Honorable R. A. Green, Jr. declared the presentment of the insanity defense unconstitutional. This ruling is now in appeal. If the Appellate Court eventually reverses Judge Green, the Defendant herein may be prejudiced to the presentation of the insanity defense unless an examination is ordered at the present time. The passage of time diminishes the ability of the examining physicians to determine the Defendant's sanity or insanity at the time of the commission of the alleged offense.

6. That the Defendant was admitted to Alachua General Hospital under an emergency Baker Act procedure following his attempted suicide and was preliminarily examined by Jose Llinas, M.D.

Notice is also hereby given that the Defendant may rely upon insanity as a defense in this cause in compliance with Section 914.06 of the Florida Statutes.

Defendant also respectfully asks that he be given fifteen (15) days in which to file a bill of particulars after receipt of the psychiatric evaluation.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Honorable Eugene T. Whitworth, State Attorney, Post Office Box 1437, Gainesville, Florida, this 15th day of November, 1977.

Respectfully submitted,

C. Richard Parker

for STEPHEN N. BERNSTEIN
Assistant Public Defender
317 N.E. First Street
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